1980

State of Utah v. Bert Leon Hanson : Brief of Respondent

Utah Supreme Court

Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;
Robert M. McRae; Attorney for Appellant;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BERT LEON HANSON,

Defendant-Appellant.

Case No. 17078

BRIEF OF RESPONDENT

APPEAL FROM A PLEA OF GUILTY TO MANSLAUGHTER IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE DAVID SAM, JUDGE, PRESIDING

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT M. McRAE

319 West First South, Suite A
Vernal, Utah 84078

Attorney for Appellant

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was initially charged with Second Degree Murder, in violation of § 76-5-203, Utah Code Annotated (1953), as amended. Subsequently, an amended information was filed charging appellant with Manslaughter by having recklessly caused the death of another in violation of § 76-5-205, Utah Code Annotated (1953), as amended.

DISPOSITION IN THE LOWER COURT

On March 5, 1980, counsel for the State was granted his motion to file an amended information charging appellant with the crime of manslaughter in violation of § 76-5-205, Utah Code Annotated (1953), as amended. On the same day before the Honorable David Sam, in the Fourth Judicial District

Court, in and for Duchesne County, State of Utah, appellant pled guilty to the charge of manslaughter. On April 11, 1980, appellant was sentenced by Judge Sam to the Utah State Prison for a period of not less than one year nor more than fifteen years as provided by § 76-3-203(2), Utah Code Annotated (1953) as amended.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of Judge Sam's denial of appellant's motion to withdraw his guilty plea, rejection of appellant's claimed due process violation, and affirmation of the sentence imposed.

STATEMENT OF THE FACTS

On September 4, 1979 appellant brought his infant daughter, Camie Lee Hanson, to the Duchesne County Hospital in Roosevelt, Utah for the treatment of multiple injuries. Shortly after arriving at the hospital the infant died. On September 5, 1979 appellant was charged with the crime of Murder in the Second Degree in violation of § 76-5-203 Utah Code Annotated (1953), as amended.

On November 13, 1979, the date set for arraignment in District Court, appellant was in the psychiatric unit of St. Mark's Hospital for treatment. Pursuant to a request by defense counsel, Judge Sam, ordered the arraignment continued to December 10, 1979 (R. 20).

Prior to the December 10, 1979 arraignment, appellant filed notice of his intent to rely on the defense of insanity pursuant to § 77-24-17, Utah Code Annotated (1953), as amended (R. 21). At the arraignment, appellant entered a plea of not guilty and not guilty by reason of insanity. At that time the Court ordered appellant to be examined by two psychiatrists who were to determine appellant's sanity at the time of the offense. Jury trial was set for February 7, 1980 by Judge Sam (R. 22), but was subsequently rescheduled for March 5, 1980 (R. 25).

During the period prior to the March 5, 1980 trial date, the State and the defense entered into plea negotiations, the result being the filing of an amended information on March 5, 1980 charging appellant with manslaughter in violation of § 76-5-205, Utah Code Annotated (R. 26). To the amended information appellant entered a plea of guilty. Counsel for the State indicated to the court that it would be in the best interest of appellant that he not be incarcerated but that he continue with treatment (R. 27). The court advised appellant of his rights regarding the entry of a guilty plea, and informed appellant that the court would not be bound by any recommendations (R. 27). Lastly the court determined that appellant made such plea voluntarily and with full knowledge of his rights. The court referred the matter to

Adult Probation and Parole for a pre-sentence investigation and report, and continued the case until April 11, 1980 for sentencing (R. 27).

On April 11, 1980, following a meeting in chambers with the trial judge and prior to sentencing, appellant moved for a continuance of one week to allow time to file against Judge Sam continuing in the case (R. 131). This motion was denied. Appellant further moved to withdraw his guilty plea which was also denied (R. 132). Finding no legal reason why judgment should not be pronounced, the trial court sentenced defendant to the Utah State Prison for a period of not less than one year nor more than fifteen years (R. 28, 133).

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT APPELLANT TO WITHDRAW HIS PLEA OF GUILTY.

Appellant has correctly stated the law that under the terms of § 77-24-3 Utah Code Annotated (1953), as amended, and according to the great weight of authority, a motion to withdraw a plea of guilty is addressed to the sound discretion of the trial court, and that a criminal defendant may not withdraw a guilty plea as a matter of right. State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963); State v. Harris, 585 P 2d 450 (Utah 1978). Appellant is contending, however, that the trial court abused its discretion in refusing to allow him to

withdraw his guilty plea. As relief, appellant asks this Court to allow the withdrawal of his guilty plea, and to remand the case for trial. Respondent respectfully submits that the trial court's refusal to allow appellant to withdraw his plea of guilty was within the discretion granted that court by law. Respondent therefore asks this Court to affirm the trial court's denial of appellant's motion to withdraw his guilty plea and to affirm the sentence imposed.

Appellant was originally charged with Second Degree Murder under § 76-5-203 Utah Code Annotated (1953), as amended. On the day scheduled for trial on the murder charge, the State moved to amend the information and to charge appellant with manslaughter. Since appellant had no objection, the court granted the motion and appellant pled guilty.

Before accepting appellant's guilty plea to the charge of manslaughter, the trial court explained to appellant his rights regarding entry of a guilty plea. The trial court also advised appellant that it was not bound by recommendations of the doctors, County Attorney or the Adult Probation and Parole Department (R. 27). The trial court found appellant's guilty plea to be free and voluntary made with full knowledge of his rights and the possible consequences (R. 27).

This questioning by the court meets the requirements of Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709

(1969) that a guilty plea be knowingly and intelligently given, and Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323 (1969), that a plea be made voluntarily, without undue influence or coercion. Respondent submits that the trial court fulfilled its duty under the law in determining that appellant's plea was voluntarily given. Under the rationale of Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973) and State v. Yeck, 566 P.2d 1248 (Utah 1977), the trial court did not abuse its discretion in refusing to allow the plea to be withdrawn. In Stinson, the court held that where the appellant had made a recent and clear statement before the sentencing judge that he understood the charge and the maximum punishment and the judge was advised of the plea bargain, the refusal to permit the plea to be withdrawn was not an abuse of discretion by the state trial court. And in Yeck, supra, this Court stated:

> The right to a jury trial is constitutionally guaranteed but it may be waived, and when no issue is raised as to innocence, there is nothing to try. Once a plea of guilty is knowingly and voluntarily entered, there are no issues for trial. Where, as here, the plea of guilty is entered apparently in a plea bargaining deal, there is no compelling reason to permit it to be withdrawn by the accused. It is a matter lying entirely within the discretion of the trial court and the denial of a motion to withdraw a guilty plea will be reversed on appeal only when an abuse of discretion is shown on the part of the trial judge. [Footnotes omitted.]

Id. at 1249. (Emphasis added.)

Appellant's argument that he was the victim of a manifest injustice because the trial court did not follow the recommendations of the examining psychiatrists, fails to recognize that the trial court is not bound by any recommendations. Under § 76-3-404 Utah Code Annotated (1953), as amended, "after receiving the report and recommendations, the court shall proceed to sentence a defendant in accordance with the sentencing alternatives provided under § 76-3-102." A trial court is not bound by a plea bargain agreement, unless the court in some way induced the plea. Santobello v. New York, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971) cited by appellant is only applicable if the prosecution has failed to carry out its bargained for obligation. In Santobello, Mr. Chief Justice Burger, writing for the majority stated:

> This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement by the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262.

In the present case, appellant agreed to plead guilty pursuant to a plea bargaining process, upon the advice

of competent counsel, voluntarily and knowingly. This was not a case where the appellant was not given the promised bargain by the prosecution. The prosecution kept its part of the bargain by amending the charge from second degree murder to manslaughter, and by recommending to the trial court that appellant not be incarcerated (R. 27). Appellant was given no promise that he would not be sentenced to prison, he could only be assured that the prosecutor would make the recommendation. The fact that appellant expected leniency is not enough to render his guilty plea involuntary, nor does the fact that a plea of guilty was entered because of the possibility of obtaining a more lenient sentence make such a plea an involuntary one. In Miles v. Parratt, 543 F.2d 638 (8th Cir. 1976), the appellant contended that the state trial court should be bound by a plea agreement or, in the alternative that the court is required to indicate to the defendant its rejection of the terms of the plea agreement and afford the defendant an opportunity to withdraw his plea before sentence is pronounced. In rejecting both alternatives the Miles court stated:

> [T]he evidence adduced at the hearing indicates that appellant knew that the court was not legally bound by the plea agreement, and that appellant merely believed that the court would probably go along. Such a subjective belief that a lenient sentence will be imposed, even if based on an erroneous estimate by defense counsel, does not render a plea involuntary. [Citations omitted]

Id. at 639. (Emphasis added.)

Appellant attempts to distinguish the overwhelming case law which acknowledges that a trial court has discretion in accepting or rejecting the withdrawal of a plea, by asserting that most cases involve a motion to withdraw after sentencing, rather than before as in the present case. However, several Utah cases deal directly with an attempted withdrawal prior to sentencing.

In State v. Larson, 560 P.2d 335 (Utah 1977) the defendant attempted to withdraw his guilty plea before sentencing, claiming a later discovered basis of defense. In rejecting the appeal this Court stated:

> We are convinced that the trial court took all the necessary precautions to insure that the guilty plea was voluntary and that the consequences of such a plea were clearly understood by appellant. To hold otherwise would allow a defendant to change a plea at will up until the time of sentencing.

Id. at 337. (Emphasis added.)

Furthermore, in State v. Olafson, 567 P.2d 156 (Utah 1977) this Court rejected the appellant's argument that any withdrawal prior to sentencing should be granted as a matter of right. The appellant in Olafson claimed that his plea was not voluntary and that he had a good and meritorious defense. This Court stated:

> Defendant finally contends this Court should adopt a ruling that a motion to set aside a plea of guilty, filed prior

> to sentencing, should be granted as a matter of right.
>
> Section 77-24-3 U.C.A. (1953) provides:
>
> . . . The court may at anytime before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted.
>
> This Court has consistently interpreted this statute as conferring "a discretionary power upon the trial court to allow or disallow the change of a plea." [Footnotes omitted]

Id. at 158. (Emphasis added.)

From these cases it is apparent that regardless of whether an attempt to withdraw a guilty plea is made before or after sentencing, the decision to allow the motion rests entirely within the discretion of the trial court, and absent the showing of clear abuse, this decision will not be disturbed. Appellant has shown no abuse, consequently the trial court's decision should be affirmed.

Appellant was aware that the trial judge was not planning to follow the plea bargain as a result of a conversation in chambers with the trial judge prior to the sentencing proceeding (R. 130). Appellant should not now be allowed to withdraw his plea simply because he feels he made a "bad deal" and didn't receive the sentence he believed he would get. Miles, supra.

Finally although many other jurisdictions have expanded the right of defendants to withdraw guilty pleas,

Utah is not one of these jurisdictions. Utah law is clear on the issue of withdrawal of a plea. To allow or refuse to allow defendant's guilty plea to be withdrawn, is within the sound discretion of the trial court and can only be disturbed by a showing of clear abuse. The fact that an accused pleads guilty with the hope that he will not be incarcerated is insufficient to allow the withdrawal of a guilty plea where a sentence is imposed. Whether a guilty plea was coerced and involuntary is ordinarily a question of fact, and district court findings are not to be disturbed unless they are clearly erroneous or without support in the record. Gurule v. Turner, 461 F.2d 1083 (10th Cir. 1972).

Respondent respectfully submits that from the above it is clear that the trial court acted properly in accepting appellant's guilty plea. The appellant here entered a plea of guilty to the charge of manslaughter and received the correct sentence for that crime. Respondent urges this Court to affirm the trial court's ruling and the sentence imposed.

POINT II

APPELLANT SUFFERED NO VIOLATION OF DUE PROCESS RIGHTS SINCE THE SIXTH AMENDMENT DOES NOT EXTEND TO A PRE-SENTENCE INVESTIGATION.

On March 5, 1980, appellant entered a plea of guilty to an amended charge of manslaughter under Utah Code Ann. § 76-5-205 (1953), as amended. After finding the plea to be voluntary and informing appellant of his rights and the possible consequences of a guilty plea, Judge David Sam referred the matter to the Adult Probation and Parole Department for a pre-sentence investigation and report. Following a thorough investigation into the incident, including appellant's background, marital history, health, employment history, and collateral contacts, it was the recommendation of Adult Probation and Parole that probation be denied and that appellant be committed to the Utah State Prison for the term prescribed by law.

It is appellant's contention that the staff meeting, "paneling," of Adult Probation and Parole, at which the staff reviewed all the information regarding appellant's case and made its written recommendation to the court, constituted a "hearing" and as such appellant had a constitutional right to be present and heard and to confront and cross-examine witnesses against him. Since

appellant was not present at this staff meeting, he asserts that his due process rights as guaranteed by the Sixth Amendment of the United States Constitution were violated. It is respondent's position that the formulation of a pre-sentence report by Adult Probation and Parole is not a hearing subject to Sixth Amendment protections. Since appellant had no constitutional right to be present at the staff meeting, there was no violation of due process.

Appellant cites no cases in support of his theory that he was constitutionally entitled to be present when the Adult Probation and Parole staff made their report. Case law on the subject rejects appellant's theory, as evidenced by Commonwealth ex rel. Lockhart v. Myers, 165 A.2d 400 (Pa. 1960), cert. den. 368 U.S. 860, 7 L.Ed.2d 57, 82 S.Ct. 102, where the Court wrote:

> Appellant complains that testimony was then given by unsworn witnesses in his absence. It is of course true that a defendant charged with a felony has a right to be present at every stage of the proceedings from arraignment to the rendition of the verdict. [Citations omitted.] However, this right does not extend to a pre-sentence investigation.

Id. at 405 (emphasis added).

In Utah, a defendant may have the contents of a pre-sentence report disclosed to him prior to sentencing. In State v. Lipsky, 608 P.2d 1241 (Utah 1980), this Court

held that the trial court committed reversible error in sentencing defendant where a pre-sentence report prepared by the Adult Probation and Parole Department had not been disclosed to the defendant. However, appellant in the instant case is not asserting he was denied access to the pre-sentence report, rather he contends he should have been present when the report was made. This Court appears to have touched on this question in Lipsky:

> However, it does not follow that § 77-35-13 encompasses the pre-sentence report. On the contrary, we hold, for the reasons discussed below, that the trial court may receive information concerning the defendant in the form of a pre-sentence report without the author of the report necessarily personally appearing and testifying in open court, as would be required by § 77-35-13, but that the report should be disclosed to the defendant. If the defendant thinks the report inaccurate, he should then have the opportunity to bring such inaccuracies to the court's attention.

Id. at 1244 (emphasis added).

The California Supreme Court in People v. Arbuckle, 587 P.2d 220 (Calif. 1978), similarly held that a defendant had no right to cross-examine Department of Corrections' employees who had prepared a sentencing report. The Arbuckle Court said:

> The defendant could have challenged factual statements contained in the report by presenting his own evidence; but fundamental fairness does not require that he be

> allowed to challenge such statements by cross-examining the personnel who prepared the report, nor does it require that he be permitted to challenge the professional methods they employed.

Id. at 223 (emphasis added).

Applying the rationale of both Lipsky and Arbuckle, if the author of a report need not testify or be confronted in open court, neither should the meeting at which the report is formulated be subject to confrontation or cross-examination. Accordingly the absence of appellant from the meeting or appellant's inability to confront and cross-examine cannot be a violation of appellant's due process rights.

Appellant's due process rights were fully guaranteed by the opportunity to examine his pre-sentence report and to be heard on those items in the report which the trial court would be considering in sentencing. Appellant's failure to take advantage of these opportunities should not be the basis of this Court's extending due process rights to including being present at a pre-sentence investigation since this goes beyond the scope and intent of the Sixth Amendment protections.

Since appellant's claim is neither supported by constitutional interpretation nor statutory or case law, respondent respectfully asks this Court to reject appellant's claim.

Moreover, appellant's claim would impose an impossible administrative burden on the Adult Probation and Parole Department. Appellant's argument also ignores the fact that a staff paneling is not an adversary hearing or a hearing, but rather an executive function not affected by the Sixth Amendment.

POINT III

APPELLANT'S SENTENCE IS WITHIN STATUTORY LIMITS SET BY THE UTAH LEGISLATURE FOR A SECOND DEGREE FELONY; THEREFORE, THE SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

Appellant pled guilty to the charge of manslaughter, a second degree felony under Utah Code Ann. § 76-5-205 (1953), as amended, and was sentenced under Utah Code Ann. § 76-3-203(2) (1953), as amended, for the indeterminate term of not less than one year nor more than fifteen years. It is appellant's contention that the sentence providing for incarceration at the Utah State Prison constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

It is the general rule that a sentence which imposes punishment within the limits prescribed by a valid statute cannot amount to cruel and unusual punishment. Smith v. United States, 273 F.2d 462 (10th Cir. 1959), cert. den. 363 U.S. 846, 4 L.Ed.2d 1729, 80 S.Ct. 1619 (1960). See also Matter of Jones, 578 P.2d 1150 (Mont. 1978); United

States v. MacClain, 501 F.2d 1006 (10th Cir. 1974). Similarly, even if the penalty imposed is harsh, it does not mean it constitutes cruel and unusual punishment. People v. Lake, 580 P.2d 788 (Colo. 1978).

In State v. Ethington, 592 P.2d 768 (Ariz. 1979), the appellant asserted that the sentence imposed was so excessive that it constituted cruel and unusual punishment. The Court held:

> Appellant's sentence is within statutory limits, and since the statute has not been declared unconstitutional, his sentence cannot be deemed cruel and unusual punishment.

Id. at 770 (footnotes omitted). In a special concurrence, Justice Gordon wrote:

> In order to challenge a penalty as cruel and unusual, this Court, adhering to the weight of authority on the subject, has indicated that the statute imposing the sentence, rather than the specific sentence itself, must be shown to be unconstitutional:
> "[W]here the statute fixing punishment for an offense is not unconstitutional, a sentence within the limits prescribed by such statute will not be regarded as cruel and unusual." (Emphasis added.) State v. Castano, 89 Ariz. 231, 233, 360 P.2d 479, 480 (1961).

Id. at 771 (emphasis added).

Appellant in this case does not challenge the constitutionality of the statute imposing the sentence,

but merely argues that the sentence as applied to him is cruel and unusual. In People v. Wingo, 534 P.2d 1001 (Calif. 1975), the California Supreme Court wrote:

> Finally we pause to emphasize the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. [Footnotes omitted.) The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. [Citations omitted.] While these intrinsically legislative functions are circumscribed by the constitutional limits of article 1, section 17, the validity of enactments will not be questioned "unless there unconstitutionality clearly, positively and unmistakably appears." [Citations omitted.]

Id. at 1006.

The Utah State Legislature has determined that conviction of the crime of manslaughter is punishable by imprisonment of between one and fifteen years at the Utah State Prison. Appellant was sentenced within the limits proscribed by the legislature. Merely asserting that the sentence is excessive as applied to him is not enough. In State v. Nance, 20 Utah 2d 372, 438 P.2d 542 (1968), appellant in addition to challenging the constitutionality of the statute, argued that the imposition of the maximum sentence for a check of $13.32 was so excessive as to constitute cruel and unusual punishment. This Court said:

> Generally if the statute fixing the punishment be not unconstitutional, a sentence within the limits prescribed by such a statute will not be regarded as cruel and unusual. However, where there is a wide spread between the minimum and maximum punishment, whether any particular sentence is cruel or unusual is a matter to be determined under all the facts and circumstances. [Footnotes omitted.] We cannot impose our judgment on the trial court. Our inquiry is limited to the question of whether the sentence imposed in proportion to the offense committed is such as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances. [Footnotes omitted.]

Id. at 544. Appellant pled guilty to the crime of manslaughter, the victim being a month old baby. The trial judge acting within his discretion and the statutory limits, sentenced appellant to an indeterminate sentence of not less than one year nor more than fifteen years. In pronouncing the sentence, the trial judge stated:

> Before pronouncing judgment I wish to state that the court has reviewed the medical reports and the recommendations that are contained therein and it is the judgment of the court that because of the nature of the offense and the manner in which the offense was committed that this offense should not go unpunished.

(R.132). Taking all the facts and circumstances into account, the trial judge sentenced appellant to the term provided by law. As such, the sentence is neither "shocking to the conscious," Lloyd v. State, 576 P.2d 740 (Nev. 1978);

nor an abuse of judicial discretion.

Appellant's sentence cannot be considered cruel and unusual punishment for three reasons: first, the sentence was within statutory limits; second, appellant has failed to challenge the constitutionality of the statute; third, there was no showing of any abuse of judicial discretion, nor was the sentence disproportionate to the crime. For these reasons, respondent respectfully asks this Court to affirm the sentence.

CONCLUSION

Because the trial court validly accepted a guilty plea and did not abuse its discretion in sentencing or in refusing to vacate the plea, respondent respectfully asks the court to affirm the judgment and sentence.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent